To Be Argued By
Susan L. Hauser, Esq.
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STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

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GAY ALLIANCE OF GENESEE VALLEY, INC.,

Respondent,

v.

CITY ASSESSOR, CITY OF ROCHESTER, NEW YORK,

Appellant.

---

# APPELLANT'S BRIEF

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## QUESTIONS PRESENTED

1. Has the respondent, a gay rights organization, carried its burden of proving that it is entitled to a real property tax exemption under section 420-a of the Real Property Tax Law, as a charitable organization, an educational organization, or an organization for the moral or mental improvement of men, women, or children, or some combination of those purposes, and that its property is used in furtherance of those purposes?

The Court below answered yes.

2. Has the respondent carried its burden of proving that the denial of a tax exemption to it by the City constituted unlawful discrimination against it under 42 U.S.C. sec. 1983, thereby warranting an award of attorneys fees under 42 U.S.C. sec. 1988?

The Court below answered yes.

3. Was the respondent entitled to a protective order, denying the City discovery about the nature of its activities?

The Court below answered yes.

4. Was there evidence justifying the court in directing a hearing on possible sanctions against the City under 22 NYCRR sec. 130-1 for allegedly frivolous discovery requests?

The Court below answered yes.

## STATEMENT OF FACTS

The Gay Alliance of the Genesee Valley, Inc. (GAGV) is a not-for-profit gay-rights organization located within the City of Rochester (R.285-87). In March, 1990, the GAGV purchased a building at 179-183 Atlantic Avenue in the City of Rochester for use as a Community Center (R.288). In January, 1991, the GAGV applied to the City Assessor for a tax exemption for the property, under section 420-a of the Real Property Tax Law. On its application, it checked "educational" as the category of exemption it was seeking (R.317).

In support of its application, the GAGV alleged that its purpose was to "support the eradication of homophobia through educational means" (R.317). The activities through which it accomplished that purpose were listed as follows:

> GAGV supports the eradication of homophobia, the delivery of unbiased health care, employment protection, social integration, full legal rights and protection, personal financial security for all Gay men, Lesbians and Bisexual people.
>
> We stand as a coalition of individuals and interest groups working toward these goals: To support the development of social educational organizations such as: Lesbian Resource Center, Men's Group, Political Caucus, Literary groups, Bowling, Lesbian and Gay Youth of Rochester, and Queer Nation. We provide weekly programs such as the Saturday Nite Social. The GAGV publishes a monthly newspaper distributed free to the Gay and Lesbian Community. GAGV had (sic) a Speakers' Bureau for educational presentations. We also operate a peer facilitation hotline for Gay and Lesbian people, or others who are concerned about these issues, giving referrals or just listening. (R.317)

The major "Program Service Accomplishments" listed by the GAGV in its annual federal tax returns include an annual picnic for the gay community, and the publication of a newspaper for the Gay Community, entitled "The Empty Closet" (R.57, 76, 88). The newspaper is a major activity of the organization. Each year, it generates nearly as much in income as in expenses; in 1991, for example, it generated $41,474 in income and $42,330 in expenses (R.88, 91). The picnic is a major fund-raising event for the organization; in 1991, it generated $23,656 in income but cost only $8,272 in expenses (R.88, 91).

In 1991, the GAGV sponsored a two-day convention, held in downtown Rochester. In its tax return, it described the convention as consisting of "educational workshops and group sessions discussing issues of concern to gay and lesbian people" (R.88). The convention brought in $20,256 in income, and cost $29,816 (R.88, 91).

The 1991 income and expenses of the GAGV, as shown in the organization's 1991 tax return (R.87-99), are summarized as follows:

| | 91 Income | 91 Expense |
|---|---|---|
| Picnic | $23,656 | $8,272 |
| Newspaper | 41,474 | 42,330 |
| Convention | 20,056 | 29,816 |
| Various "minor" activities (parade, sub-groups, brochures) | | 3,344 |
| Contributions, grants | 43,088 | |
| Special fund-raising event(s) | 10,150 | |
| Interest income | 652 | |
| Room usage income | 192 | |
| Other expenses (management) | | 15,902 |
| Totals | $139,268 | $99,664 |

The GAGV's tax returns show that the organization has accumulated net assets over the past three years, shown as follows:

| | Net Earnings | Net Assets Year End |
|---|---|---|
| 1988 | | $27,472 |
| 1989 | $17,817 | 45,289 |
| 1990 | 26,134 | 71,423 |
| 1991 | 39,604 | 111,027 |

(R.56, 75, 87)

After a review of the GAGV's exemption application, and consultation with the Corporation Counsel's office, the City Assessor denied the GAGV's application on March 8, 1991 (R.325). On March 22, 1991, the GAGV filed a Complaint on Real Property Assessment for 1991-92 with the City's Board of Assessment Review (R.327-330), seeking an exemption for the property. In its written materials (R.333-335) and in its oral presentation to the Board, the GAGV indicated that it was seeking an exemption in three of the categories set forth in section 420-a of the Real

| | | |
|---|---|---|
| Picnic | $23,656 | $8,272 |
| Newspaper | 41,474 | 43,330 |
| Convention | 20,058 | 19,816 |
| Various "minor" activities (parade, sub-groups, brochures) | | 1,744 |
| Contributions, grants | 43,088 | |
| Special fund-raising event(s) | 10,190 | |
| Interest income | 652 | |
| Room usage income | 192 | |
| Other expenses (management) | ------ | 12,282 |
| Totals | $179,268 | $89,804 |

The CADV's tax returns show that the organization has accumulated net assets over the past three years, shown as follows:

| | Net Earnings | Net Assets Year End |
|---|---|---|
| 1988 | | $27,472 |
| 1989 | $17,817 | 45,289 |
| 1990 | 26,134 | 71,423 |
| 1991 | 39,804 | 111,027 |

(R.86, 75, 87)

After a review of the CADV's exemption application, and consultation with the Corporation Counsel's office, the City Assessor denied the CADV's application on March 8, 1991 (R.325). On March 12, 1991, the CADV filed a Complaint on Real Property Assessment for 1991-92 with the City's Board of Assessment Review (R.327-330), seeking an exemption for the property. In its written materials (R.333-335) and in its oral presentation to the Board, the CADV indicated that it was seeking an exemption in three of the categories set forth in section 420-a of the Real

Property Tax Law: educational, charitable, and moral or mental improvement.

In April, 1991, the Board of Assessment Review rendered a decision denying the exemption. The decision letter it issued was confusing, however, and did not make clear the substance of the decision (R.348). The decision was clarified in an August 22, 1991, letter from Municipal Attorney Susan L. Hauser to the GAGV's counsel, Ellen M. Yacknin (R.237).

On August 23, 1991, the GAGV served on the City a petition under Article 78 of the Civil Practice Law and Rules, seeking a tax exemption for its property (R.285-94). After discussions between the parties, on October 23, 1991, the parties signed a Stipulation that the proceeding would be converted to a declaratory judgment action, and the petition would thenceforth be deemed a complaint (R.281-82). On November 12, 1991, the City served its answer (R.275-80).

Nearly a year later, on October 15, 1992, the GAGV moved to amend its complaint and for summary judgment (R.163-240). The amendment that it sought to make was to add a cause of action alleging unlawful discrimination under 42 U.S.C. sec. 1983, and seeking an award of attorneys fees. It also sought summary judgment on both its original cause of action seeking a tax exemption and its new cause of action for attorneys fees. The

City opposed both parts of the motion, and made a cross-motion for summary judgment, in papers dated November 12, 1992. Upon argument of the motions, the court found that the Board of Assessment Review's decision from April, 1991, was not sufficiently clear, and remanded the matter to the Board to reissue its decision. The parties' motions were denied without prejudice (R.161-62).

On December 31, 1992, the Board of Assessment Review issued a revised decision letter, clarifying that the Board had decided that the GAGV did not qualify for exemption under any of the categories sought: educational, charitable, or moral or mental improvement (R.152-53).

On January 12, 1993, the GAGV renewed its earlier motion to amend its complaint. The City opposed the motion (R.154-60). On February 26, 1993, the court issued a Memorandum Decision and Order granting leave to amend the complaint (R.128-31).

On February 26, 1993, the GAGV served its amended complaint (R.118-27). On March 22, 1993, the City served its answer to the amended complaint (R.112-17). At the same time, the City served a Request For Production of Documents, seeking certain financial documents of the GAGV (R.111), and a Notice of Oral Deposition, seeking an examination of Paul Scheib, President of the GAGV, regarding the activities of the GAGV and the uses of the property

for which it seeks a tax exemption (R.110).

On March 23, 1993, the GAGV moved for a protective order barring the City from obtaining the requested discovery (R.37a), and also moved for summary judgment on the amended complaint (R.28-37). (Even though it moved for a protective order, the GAGV supplied to the City the financial information sought in the Request For Production of Documents (R.40); the GAGV refused, however, to comply with the City's request for a deposition.) The City opposed the GAGV's two motions, and cross-moved for summary judgment dismissing the complaint, in papers dated April 2, 1993.

On April 5, 1993, the parties orally argued the motions before the court, and the next day, April 6, 1993, the court issued a 22-page memorandum decision which (1) awarded summary judgment to the GAGV granting a tax exemption under sec. 420-a of the Real Property Tax Law, (2) awarded summary judgment to the GAGV finding that the denial of the tax exemption constituted unlawful discrimination by the City Assessor against the GAGV, thereby warranting an award of attorneys fees under 42 U.S.C. sec. 1988, (3) granted the GAGV's motion for a protective order, thereby denying the City discovery, and (4) sua sponte directed a hearing on possible sanctions against the City under 22 NYCRR sec. 130-1 for allegedly frivolous discovery requests. An order was entered on the decision on April 28, 1993.

The City appealed from all parts of the order on May 11, 1993.

## ARGUMENT

### Point 1. Eligibility of GAGV For Tax Exemption

#### a. Eligibility for tax exemption must be determined by reference to State law, not the practices of local assessors.

This case raises issues of both tax exemption eligibility and unlawful discrimination. The two issues, however, are separate and discrete.

We submit that this case is fundamentally a tax exemption case, not a discrimination case. The primary question is whether the GAGV qualifies for a real property tax exemption under any of the categories set forth in section 420-a of the Real Property Tax Law. If it does, then it is entitled to a tax exemption; if it does not, then it is not entitled to a tax exemption.

That basic tax exemption question must be determined by reference to state law, both statutory and case law. It cannot be determined by reference to other exemptions that may have been granted or denied by the City Assessor, or by assessors in other jurisdictions.

We submit that the court below confused the tax exemption issue with the discrimination issue, and tried to determine the

ARGUMENT

GAGV's eligibility for tax exemption solely on the court's perception of discrimination.

In explaining why it found that the GAGV qualified for tax exemption, the court stated that "Similar organizations in New York City and Albany have received exemptions from property taxation." (R.20) The court acknowledged that these decisions were not "binding", but apparently found them persuasive as precedent. Next, the court cited two neighborhood organizations previously granted exemptions by the City, Group 14621, Inc. and the 19th Ward Community Association, as additional precedent for granting an exemption to the GAGV (R.21).

Several pages later in the decision, the court noted that the City has granted exemption to a public broadcasting station (WXXI), Planned Parenthood, the Drug and Alcohol Council, Cancer Action, the Association for the Learning Disabled, and the Genesee Valley Heart Association (R.24). Without having any information about these organizations other than their names, the court concluded that the organizations did not fit within any of the traditional exempt categories, and that they therefore served as additional precedent for adopting an expanded definition of the exempt categories, which would include the GAGV.

There are two fundamental problems with the court's analysis. First, there is virtually no evidence in the record of

the facts pertaining to any of these organizations, either the Albany and New York City organizations, or the two Rochester neighborhood groups, or the other listed Rochester organizations. Thus there is no basis for deciding whether they are similar to the GAGV, or whether they meet any of the traditional tests for tax exemption. Secondly, and more importantly, the law of eligibility for tax exemption is created by the State Legislature and the courts, not by local assessors. The tests to be applied are those set forth in the statute and by the courts, not those applied by assessors in other cases.

In fact, it is not even clear whether the court below concluded that the GAGV truly did qualify for exemption, or just that the other groups granted exemption by the City did not qualify for exemption.

> The City claims that these [neighborhood] organizations are exempt because they receive government funds to administer programs benefitting low-income residents, and are thus charitable. This argument is not a strong one, . . . (R.21).
>
> [N]eighborhood advocacy groups granted tax exemptions cannot be considered charitable merely because they receive some money to service the needs of low-income residents. (R.24)

The court's position appears to be that since the City (in the court's view) applied a lax standard in granting exemptions to the neighborhood groups, it is obligated to apply an equally

lax standard to the GAGV's application.[1]

All the discussion of other exempt organizations is ultimately irrelevant to the question of whether the GAGV is entitled to a tax exemption under state law. That issue must be resolved on the language of the statute and the various relevant court decisions.

The GAGV is certainly entitled to raise a discrimination issue in this lawsuit, if it believes it has been unlawfully discriminated against. But that issue can only be addressed after the preliminary tax exemption issue has been decided.

If the GAGV is found to qualify for exemption, then the question can be asked whether the City's denial of the exemption was motivated by an unlawful intent to discriminate. At that point, the City's actions in granting or denying other exemptions might become relevant. On the other hand, if the GAGV is found not to qualify for exemption, then there is a justification for the City's decision to treat the GAGV differently from the other

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[1] It is difficult to know on what basis the court concluded that the two neighborhood organizations did not in fact meet the traditional tests of charitability under the statute. The only documents in the record about those organizations were the Certificate of Incorporation of Group 14621, Inc. (R.198) and the By-Laws of the 19th Ward Community Association (R.212). Those organizations' tax exemption application papers to the City Assessor were not presented, and neither was any evidence or testimony about the activities of the organizations or the uses of their property.

organizations granted tax exemption, and there is presumably no unlawful discrimination.[2]

As discussed in Point 2 of this brief, we believe that the unlawful discrimination issue was reached prematurely by the court below. If and when that issue is properly reached, and if there is a legitimate question at that point about any exemptions the City has granted on other properties, the City will be prepared to defend those exemptions. However, at the present time there is simply no probative evidence in the record regarding the eligibility for exemption of other properties in the City.

Rather than looking at other exemptions granted by the City, the court should have started by determining whether the GAGV qualifies in its own right for tax exemption under section 420-a of the Real Property Tax Law.

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[2] If the GAGV's claim is that, while it may not be entitled to an exemption, other organizations have improperly been granted exemption, the GAGV, like any taxpayer, would have a right to challenge the granting of those exemptions in a taxpayer's lawsuit. The City believes that the tax exemptions it has granted for other properties are correct, for the most part. Certainly, there is always the possibility that an individual exemption is unjustified and erroneous. But in any event, the wrongful granting of an exemption in another case would not entitle the GAGV to an exemption for which it was not qualified.

b. Symphony Space, Mohonk, and Botanical Gardens were not intended to overrule prior law of eligibility for exemption under section 420-a.

Section 420-a provides a tax exemption for real property owned by, and used for the purposes of, a not-for-profit corporation or association organized or conducted for "charitable", "educational", or "moral or mental improvement of men, women or children" purposes, among others. The City Assessor and the City's Board of Assessment Review found that the GAGV did not qualify for exemption under this definition. The court below found that the GAGV did qualify for exemption under this definition.

While the statute has always provided that an applicant may qualify for exemption if it is organized for "two or more of such purposes", most court decisions in the past have focused on the eligibility of the applicant in a single category, the category claimed by the applicant. Presumably, the applicant had selected the category for which it felt it had the greatest likelihood of success.

Starting in 1979, a somewhat different approach was taken by the Court of Appeals in several tax exemption cases. In 1979 and 1982, the Court decided two tax exemption cases involving nature preserves, and in each case found in favor of exemption. Mohonk Trust v. Board of Assessors, Town of Gardiner, 47 N.Y.2d 476

b. Property owned, leased, and occupied by the applicant.

Failure to provide any of the required information may result in the application being rejected as incomplete.

Section 4. Section 4.3 of Rule 4 is amended to read as follows:

4.3 Applications for exemption shall be filed with the Assessor between January 1 and March 1 of the assessment year. Applications may be filed between March 2 and the 15th day of April of the assessment year upon payment of a late filing penalty of $15.00. Applications for exemption shall be filed on a form prescribed by the Assessor. The Assessor may require the applicant to furnish such information as may be reasonably necessary to determine the eligibility of the property for exemption. The Assessor may require that the information be provided under oath. Failure to file an application by the deadline or to furnish requested information may result in denial of the exemption.

Section 5. Section 4.4 of Rule 4 is amended to read as follows:

4.4 Applications for exemption may be filed for the following categories of property:

a. Religious, church, and parsonage;

b. Cemetery, mausoleum, and crematorium;

c. Private schools;

d. Hospitals;

e. Homes for the aged;

f. Property owned by, and used for the purposes of, a not-for-profit corporation or association organized or conducted for "charitable", "educational", or "moral or mental improvement of men, women or children" purposes, among others. The City Assessor and the City's Board of Assessment Review found that the CADV did not qualify for exemption under this definition. The court below found that the CADV did qualify for exemption under this definition.

While the statute has always provided that an applicant may qualify for exemption if it is organized for "two or more of such purposes", past court decisions in the past have focused on the eligibility of the applicant in a single category, the category claimed by the applicant. Presumably, the applicant had selected the category for which it felt it had the greatest likelihood of success.

Starting in 1979, a somewhat different approach was taken by the Court of Appeals in several tax exemption cases. In 1979 and 1981, the Court decided two tax exemption cases involving nature preserves, and in each case found in favor of exemption. Rodonx Trust v. Board of Assessors, Town of Garrison, 47 N.Y.2d 476

(1979), New York Botanical Garden v. Assessors, Town of Washington, 55 N.Y.2d 328 (1982). In both cases, the court found that the applicant qualified for exemption under "an assortment" of purposes, including charitable, educational, and moral or mental improvement of men, women or children. Mohonk, 47 N.Y.2d at 484, Botanical Garden, 55 N.Y.2d at 336.

In 1983, the Court of Appeals decided the case Symphony Space, Inc. v. Tishelman, 60 N.Y.2d 33 (1983), granting exemption to a community theater under the "general categories" of charitable, educational, and moral or mental improvement (60 N.Y.2d at 36).

In the ten years since 1983, there have not been any further significant tax exemption decisions by the Court of Appeals using the "assortment of purposes" test.

These Court of Appeals decisions from the late 1970's and early 1980's were relied upon heavily by the court below in reaching its conclusion that the GAGV qualified for exemption. The court clearly found that the prior tax exemption standards for section 420-a were broadened significantly by these decisions, and the court strongly criticized the City for failing to recognize the major change in the law that had been made by these cases (R.18-19).

The question, then, is to what extent the Court of Appeals did intend to change substantively the test for tax exemption under section 420-a by its decisions in those three cases.

In earlier cases the Court had clearly established that in order to qualify for tax exemption under section 420-a, an applicant had to show more than that it conferred a public benefit, and more than that it met the test of "charitable" under the Internal Revenue Code (Swedenborg Foundation, Inc. v. Lewisohn, 40 N.Y.2d 87, 95 (1976), Ass'n of the Bar, City of N.Y. v. Lewisohn, 34 N.Y.2d 143, 154, 155 (1974)). Since the later Court of Appeals decisions did not purport to overrule these principles, we submit that they are still valid.

Clearly, an applicant must also show more than that it is a bona fide not-for-profit organization, since that is a separate test under the statute, apart from the listed categories of exemption such as "charitable" and "educational" (Real Property Tax Law sec. 420-a(1)(b)).

The real question is: Did the Court intend by its decisions in Symphony Space, Mohonk, and Botanical Garden to broaden eligibility under section 420-a to include an applicant that would not qualify under any of the individual exemption categories? Can an organization that is neither truly charitable, nor truly educational, nor truly for moral or mental

improvement be entitled to exemption under some "umbrella" category of all three categories? If so, what would be the defining characteristics of this "umbrella" category? Did the Court intend to allow an applicant which was a little bit charitable, a little bit educational, and little bit for moral or mental improvement to "piggyback" those attributes and thereby qualify for exemption?

We submit that this was not what the Court intended. As noted above, the statute has always permitted an applicant to qualify for exemption by showing that it fit either within one of the listed categories, or within "two or more" of the categories. The Court of Appeals was merely affirming that the categories are not unduly rigid, not necessarily exclusive, and that an applicant may fall into more than one category.

While the "assortment of purposes" language was used by the Court in Mohonk, Mohonk was later characterized by the Court in its decision in North Manursing Wildlife Sanctury v. City of Rye, 48 N.Y.2d 135 (1979), as being a case decided under the category "charitable" (48 N.Y.2d at 139). And as discussed further below, while the language of the Symphony Space case refers to all three categories, the holding of the case can be seen to fall squarely within the prior line of cases dealing with exemptions in the "educational" category.

Thus, we submit that the Court of Appeals did not intend to overrule its earlier tax exemption decisions with the Mohonk, Botanical Garden, and Symphony Space decisions. Rather, those decisions can be seen as fitting within the same tradition as earlier tax exemption decisions, each decision addressing the application of the law to its particular facts, but none of the decisions intending to make a fundamental change in the analysis of tax exemption questions. It is thus still the law that in each case, the applicant must affirmatively show that it meets the tests of one or more exemption category.

c. Analysis of the GAGV under the facts of decided cases.

The question is: Does the GAGV qualify for exemption under any one or more of the categories of section 420-a?

Certainly the GAGV bears no factual similarity to the nature preserve cases (Mohonk, Botanical Gardens, North Manursing). Therefore, those cases cannot serve as factual precedent for an exemption in this case.

The GAGV does bear some comparability to the organizations at issue in the Symphony Space case (60 N.Y.2d 33 (1983)) and the cases Swedenborg Foundation, Inc. v. Lewisohn, 40 N.Y.2d 87 (1976), and Asia Society, Inc. v. Tax Commission, City of N.Y., 92 A.D.2d 781 (1st Dept. 1983).

In Symphony Space, the Court found a community theater to qualify for tax exemption. In Swedenborg, the Court found an organization promoting the teachings of the theologian Emanuel Swedenborg not to qualify for tax exemption. In Asia Society, the Appellate Division, First Department, found an organization promoting knowledge and understanding between the U.S. and Asia not to qualify for tax exemption.

In all cases, the organizations were bona fide not-for-profit corporations, and the courts in all cases acknowledged that the organizations performed beneficial public services.

The Swedenborg Foundation and the Asia Society were found by the courts not to qualify for exemption because their purposes were not truly educational but instead involved promoting a specific interest.

The Swedenborg Foundation's purpose was to promote and circulate the writings and teachings of Emanuel Swedenborg, an 18th-century Swedish theologian, philosopher and scientist. While the Foundation sponsored some seminars, supported research, and maintained a library, its main mission was to actively promote Swedenborg's teachings. It published volumes of Swedenborg's writings and sold them at or below cost to a wide range of institutions as well as to the general public. The dissemination of the volumes was done largely through "outreach

distribution", by unpaid individuals who volunteered their time because of their interest in Swedenborg.

The Asia Society's purpose was to "help bring the peoples of the United States and Asia closer together in their knowledge and understanding of each other" (Asia Society, 92 A.D.2d at 781), clearly a worthwhile public service. To that end, it conducted seminars, lectures and slide shows about Asia, developed materials about Asia to be used in schools and on public television programs, and organized exhibits of Asian art as well as performances of Asian artists.

Like the Swedenborg Foundation and the Asia Society, the GAGV is an organization with a mission. The GAGV's mission is to promote the rights and interests of the local gay community and to promote better understanding and acceptance of gay people by the community at large. While the GAGV's activities do encompass some educational-type activities such as maintaining a library, sending speakers to various local meetings, and providing information through a telephone line, those activities are offered in furtherance of its mission in the community, not in the true educational sense. And while the GAGV's activities do include some social-service-type activities, such as telephonic peer counseling, those activities are secondary to the GAGV's gay rights mission.

That primary mission of the GAGV puts it outside the scope of section 420-a of the Real Property Tax Law. As the Court of Appeals stated in Swedenborg,

> It is then urged that the [Swedenborg] foundation was organized and is conducted exclusively for educational purposes, i.e., to "educate" people as to the writings and views of Emanuel Swedenborg. So to hold in our opinion would involve an unacceptable extension of the concept of education. . . .
>
> Further, we conclude that, although aspects of the foundation's activities may loosely be characterized as charitable or for the moral or mental improvement of men, women or children, such purposes, either singly or in combination with other exempt purposes, are not the principal purpose of this foundation. The primary purpose of this foundation, as appears from the record, is to disseminate the writings and views of Emanuel Swedenborg. Commendable and beneficial as this purpose is, it does not qualify the foundation for exemption from real property taxation under subdivision 1 of section 421 [now 420-a]. 40 N.Y.2d at 94-95.

Likewise in this case, the GAGV's purpose of "educating" the community about gay-related issues and promoting the interests of the gay community, while commendable and beneficial, do not qualify for tax exemption under section 420-a.

While the Swedenborg Foundation, the Asia Society, and the GAGV are all primarily advocacy organizations, an example of a fundamentally different type of organization is Symphony Space, Inc., which was found by the Court of Appeals to be entitled to tax exemption (Symphony Space, Inc. v. Tishelman, 60 N.Y.2d 33 (1983)).

Symphony Space, Inc. was formed to provide facilities and instruction in the fields of dance and theater. It offered stage facilities for rehearsals and performances by student groups and "struggling artists". It conducted performances and lectures at nearby schools, as well as on-site "lectures, discussions, workshops and commentary" in the fields of "lighting, staging, promotion and publicity". Students at a nearby community college earned credits working at the theater. (Symphony Space, 60 N.Y.2d at 36)

While Symphony Space may have been an untraditional educational institution in some ways, it did fulfill the rather traditional educational function of offering instruction in a given field to interested students. Indeed, in the field of theater arts, any effective education must necessarily go beyond the classroom and offer training and experience on and behind the stage.

Thus, while the language of the Symphony Space decision may have been quite broad, its holding was in line with traditional standards of tax exemption. In Swedenborg, the Court of Appeals had said that education must consist of "teaching, instruction, or schooling" (40 N.Y.2d at 94); in Symphony Space, even though the Court did not cite Swedenborg, it followed that same standard in finding in favor of tax exemption.

The GAGV clearly does not offer "teaching, instruction, or schooling". Such education as it offers is more akin to the Swedenborg Foundation's promotion and advocacy of the writings of Swedenborg than it is to the facilities and instruction made available to students of theater arts by Symphony Space. When the GAGV says that part of its purpose is to educate the community about the needs of gay persons, that is not the type of education that is intended to receive a tax exemption.

This is not to say that an organization whose primary activity legitimately qualifies it for tax exemption, whether in the educational category or some other category, will lose that exemption if it also engages in the advocacy of a particular interest. However, while advocacy activities will not disqualify an organization from exemption, they are not sufficient, standing alone, to entitle an organization to exemption.

d. Providing a useful service to the community is not the test of eligibility for tax exemption.

The court below apparently read the Court of Appeals' decision in Symphony Space as making tax exemption available to any organization that demonstrates that it provides a genuinely useful service to the community. This would appear, though, to be a reversal of the clear prior law that "public benefit is not the test of tax exemption" (Swedenborg, 40 N.Y.2d at 95). If the

Court had meant to overrule so significant a standard by its decision in Symphony Space, surely it would have said so explicitly.

Furthermore, that change in the law would open the door to tax exemptions for virtually all not-for-profit organizations. Any group of individuals who had come together to accomplish some community purpose would than appear to qualify for exemption. If an organization promoting gay rights is tax-exempt, why not an organization promoting the rights of non-smokers? An organization promoting the rights of animals? Why not political parties, since they promote community interests?

There is no doubt that homosexuals in this community have in the past been subjected to discrimination. And it may be true that there is now a growing public consensus for accepting homosexuality, and establishing certain legal protections for homosexuals. However, it is also true that the New York State Legislature and the Federal Congress have never yet established homosexuals as a class meriting special legal protection. Sexual orientation is not among the prohibited grounds for employment discrimination set forth in the New York Human Rights Law (Executive Law art. 15, sec. 296). Neither is it among the prohibited grounds for discrimination in public accommodations set forth in the New York Civil Rights Law, sec. 40. The federal courts have refused to apply the employment discrimination

prohibitions of Title VII of the U.S. Civil Rights Act of 1964 (42 U.S.C. sec. 2000e et seq.) to discrimination based on sexual orientation. (See, Smith v. Liberty Mut. Ins. Co., 395 F.Supp. 1098 (N.D. Ga. 1975), aff'd 569 F.2d 325 (5th Cir. 1978); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).) No federal courts have recognized homosexuals as a "suspect class" warranting the "strict scrutiny" level of Equal Protection review. (See, Rowland v. Mad River School Dist., 730 F.2d 444 (6th Cir.1984), cert.den. 470 U.S. 1009 (1985); Dronenburg v. Zech, 741 F.2d 1388 (D.C.Cir.1984); Padula v. Webster, 822 F.2d 97 (D.C.Cir.1987); Watkins v. U.S.Army, 875 F.2d 699 (9th Cir.1989), cert.den. 112 L.Ed.2d 395 (1990).)

Absent some legal reason for treating a gay rights organization differently from other legitimate special interest groups, it is unwarranted to accord such a group special tax-exempt status.

Point 2. The Court's Finding of Unlawful Discrimination Under 42 U.S.C. sec. 1983 was Premature

The court below granted summary judgment to the GAGV, finding that the City's denial of a tax exemption to it constituted unlawful discrimination under 42 U.S.C. sec. 1983, thereby warranting an award of attorneys fees under 42 U.S.C. sec. 1988.

A determination of unlawful discrimination under 42 U.S.C. sec. 1983 in this case must be based on a two-part finding: (1) that the City's denial of a tax exemption to the GAGV was erroneous, and (2) that the City's denial of a tax exemption was motivated by a purposeful intention to deny the GAGV a benefit because it was an organization focused on the rights and needs of homosexuals.

The first part is the basic tax exemption question. The court below concluded that the GAGV did meet the tests of tax exemption under section 420-a of the Real Property Tax Law, and that the City's denial of the exemption was therefore erroneous. The City disputes that conclusion, as discussed above in Point 1.

The second part of the question requires an inquiry into the intent and motives of the City officials who were responsible for the tax exemption decision. On that point, the only evidence in the record is the affidavit of the City Assessor stating that he

did not intend to discriminate against the GAGV because of the composition of its membership or the nature of its mission, but that the sole basis on which he denied the exemption was his interpretation of the statute and the legal advice he had received from the Corporation Counsel (R.270).

There is absolutely no other evidence that purports to show the state of mind of the City Assessor or any other City official. There has been no testimony by any City officials about the reasons for the tax exemption decision. The GAGV has not submitted even any circumstantial evidence supporting its claim of discrimination: no allegations of any comments or remarks made by any City officials that might be deemed prejudicial or revealing of a discriminatory frame of mind, no past acts of any officials that might be deemed to show prejudice against homosexuals, no motives on the part of any City officials for discriminating against homosexuals.

The court below apparently concluded that it did not need any documentary or testimonial evidence on this point, however, because, in the court's view, there was simply no other conceivable explanation for the denial of the tax exemption.

> There is only one reasonable explanation for the Assessor's denial of the GAGV's application: that the GAGV was denied a tax exemption because the Assessor (and the City) saw support, education and advocacy for the gay and lesbian community in a different light than it did support, education and advocacy for, e.g., residents of the 14621 or 19th Ward neighborhoods. (R.25)

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On the contrary, there is another clear and reasonable explanation for the City's decision to deny tax exemption to the GAGV while granting exemptions to the two neighborhood organizations referred to by the court. That explanation has been stated, briefly, in an affidavit of City Assessor Paul H. Jacobs (R.268-272), and an affirmation of Municipal Attorney Susan L. Hauser (R.154-159): The two neighborhood organizations had been found by the City to qualify as charitable organizations because of their programs for low-income residents of their respective neighborhoods. The GAGV, on the other hand, did not appear to focus any of its programs or activities on low-income persons. That element of serving the low-income population is a crucial part of the test for charitability that the City has applied to all applications for tax exemption.

The court below apparently rejected this explanation as implausible and disingenuous, however, based on the court's own determination that the two neighborhood associations' missions were not focused on low-income residents. The court reached this determination from a reading of the Certificate of Incorporation of Group 14621, Inc. (R.198-204) and the By-Laws of the 19th Ward Community Association, Inc. (R.212-216), but without benefit of any evidence or testimony about the actual operation of the two organizations.[3]

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[3] Section 420-a provides an exemption for a corporation or association that is "organized or conducted" for one or more of the listed purposes. (See St. Joseph's Health Center Properties,

We submit that (1) the court's determination that the neighborhood associations were not charitable was not justified by the facts before it, and (2) even if such a determination appeared to be justified by the documents that had been submitted by the GAGV, the City was surely entitled to an opportunity to explain the documents and dispute that conclusion in a hearing on the issue.

The court simply did not have any probative evidence before it regarding the intentions of City officials. The court's effort to draw a conclusion about those intentions from an examination of a list of names of other organizations granted tax exemption was clearly unwarranted. The court simply had no basis for finding that the City had unlawfully discriminated against the GAGV under 42 U.S.C. sec. 1983, and its award of summary judgment on that issue was premature.

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Inc. v. Srogi, 51 N.Y.2d 127, 130-133 (1980).) Thus, the statements in a corporation's Certificate of Incoporation are not necessarily definitive on the question of the corporation's purpose.

Point 3. The Court Should Not Have Granted a Protective Order to the GAGV.

The court below granted the GAGV's motion for a protective order, thereby denying the City the discovery that it had sought by a Notice of Oral Deposition (R.110) and Request For Production of Documents (R.111).[4]

In addition, the court, sua sponte, ordered a hearing to consider the imposition of sanctions against the City under 22 NYCRR sec. 130-1.1(c) for the making of its discovery demands.

The court's granting of a protective order was erroneous, and its suggestion that sanctions against the City might be warranted was completely unjustified.

The discovery that was requested by the City would not have delayed the further progress of the case by more than a few weeks (R.40). The progress of the case at that point had already been delayed significantly by the plaintiff's indecisiveness about what to put in its complaint. The original complaint (at that time denominated a petition) was served August 23, 1991. Fourteen months later, on October 15, 1992, the plaintiff moved

[4] Even though the GAGV moved for a protective order, it voluntarily supplied to the City all the documents requested in the Request For Production of Documents (R.40). Thus, the protective order only technically applies to the Notice of Oral Deposition.

Point 5. The Court Should Not Have Granted a Protective Order to the CADV.

The court below granted the CADV's motion for a protective order, thereby denying the City the discovery that it had sought by a Notice of Oral Deposition (R.110) and Request for Production of Documents (R.111).[1]

In addition, the court, sua sponte, ordered a hearing to consider the imposition of sanctions against the City under 22 NYCRR sec. 130-1.1(c) for the making of its discovery demands.

The court's granting of a protective order was erroneous, and its supposition that sanctions against the City might be warranted was completely unjustified.

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[1] Even though the CADV moved for a protective order, it voluntarily supplied to the City all the documents requested in the Request for Production of Documents (R.40). Thus, the protective order only technically applies to the Notice of Oral Deposition.

to amend its complaint. On February 26, 1993, the court finally granted the plaintiff's request, and the plaintiff then served its amended complaint.

The City timely served its answer to the amended complaint on March 22, 1993, and on the same day served its discovery notices. It is difficult to see how the City's request can be deemed to be too late.

It is important to keep in mind that the GAGV bears the burden of demonstrating affirmatively that it is entitled to a tax exemption. This burden requires the presentation by the GAGV of sufficient facts about its activities and the uses of its property to show that it meets the tests of exemption. The City believed the GAGV had failed to meet that burden with its conclusory allegations. Thus, the City felt justified, even without discovery, in moving for summary judgment dismissing the complaint on November 12, 1992, and in renewing that motion on April 2, 1993.

It became apparent, however, during the arguments on the GAGV's motion to amend its complaint, that the court viewed the GAGV as having made a prima facie case for an exemption. Although not in agreement with that view, the City thought it prudent to seek additional information about the GAGV's operations, through discovery, in order to defend its position.

The discovery requests made by the City were prompt, focused, and not very time-consuming.

The specific information sought by the City in its discovery requests consisted of financial documents and oral testimony about the GAGV's activities. Financial information is always relevant to a determination of an organization's true purposes; how an organization gathers and spends its money speaks volumes about its essential nature.

The City also sought an opportunity to depose the GAGV's president, Paul Scheib, about the GAGV's activities and the uses of its property. The only descriptions of the GAGV's operations presently in the record are the GAGV's own self-serving and conclusory descriptions. The City is entitled to examine Scheib to flesh out the details of the GAGV's actual operations.

The City's request for discovery was appropriate, was for information clearly relevant to the issues of this case, and would not have unduly delayed the case. In granting the GAGV a protective order, the court effectively denied the City an opportunity to defend itself against the GAGV's motion for summary judgment.

Point 4. The Court Had No Basis For Suggesting the Imposition of Sanctions Against the City

There is absolutely nothing in the record to justify the court, sua sponte, in directing a hearing to determine if sanctions under 22 NYCRR sec. 130-1 would be appropriate against the City for making its discovery requests.

Section 130-1 provides that sanctions may be imposed against a party or attorney who has engaged in "frivolous conduct", defined as conduct that

> (1) . . . is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or
>
> (2) . . . is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. 22 NYCRR sec. 130-1.1(c).

In this case, there is no evidence of bad faith on the part of the City. This was the first discovery request made by the City, not a repetition of past requests. The requested discovery would not have delayed the case significantly. There is nothing to indicate that the discovery request was made by the City for some ulterior purpose.

The GAGV did not raise the issue of sanctions at all; the court made its determination sua sponte.

In support of its determination calling for a hearing on

possible sanctions, the court referred darkly to the "troubling" timing of the City's discovery requests.

> The City was fully aware that the GAGV was preparing to renew its motion for summary judgment on the basis of the amended complaint, and it is hard to escape the suspicion that the demands were made in order to harass and prejudice the Alliance and to delay the resolution of this case (R.16).

The court seems to regard as "harassment" any action taken by the City that might postpone by a few weeks the rendering of a decision in the case. Clearly, such a premise is unwarranted. The City is entitled to raise relevant issues in the case even if it renders the case more complex and slightly more time-consuming.

There is simply no basis for imposing sanctions in this case. (See Minister, Elders and Deacons of Reformed Prot. Dutch Church v. 198 Broadway, Inc., 76 N.Y.2d 411, 414-15 (1990), Steiner v. Bonhamer, 146 Misc.2d 10 (Sup. Ct. Allegany Co. 1989).)

## Summary

In its affidavits and other submissions on this summary judgment motion, the GAGV has failed to carry its burden of proving affirmatively that it is entitled by law to a tax exemption under section 420-a of the Real Property Tax Law. In finding that it had proven entitlement to exemption, the court below placed unwarranted reliance on the GAGV's assertions that similar exemptions had been granted by assessors in other jurisdictions, and on the court's own speculative conclusions about other exemptions granted in the past by the appellant City Assessor. Eligibility for exemption must be determined not by past actions of local assessors, but solely based on state law, both as expressed in statutes and as set forth in judicial decisions.

The law most directly applicable to the GAGV's exemption application is the law set forth in the judicial decisions in the Swedenborg, Asia Society, and Symphony Space cases. Those cases hold that an organization whose central purpose is advocacy is not entitled to exemption, even though some of its activities may be characterized as "educational". It is not sufficient for an organization merely to show, as the GAGV has, that it provides a useful service to the community.

The court's second holding, that the City unlawfully discriminated against the GAGV by denying its application for a tax exemption, was both unwarranted and premature. A decision on this cause of action would require an inquiry into the intent and motives of the City officials who were responsible for the tax exemption denial. There is absolutely no evidence on this issue in the record at this point. The court below decided that it did not need actual evidence, however, because it could not conceive of any other explanation of the City's actions. In fact, there are other explanations of the City's actions, and the City was entitled, at the very least, to an opportunity for a hearing on the issue.

The court below should not have granted a protective order to the GAGV. The discovery sought by the City was relevant, and would not have delayed resolution of the case more than a few weeks.

The court had absolutely no basis for sua sponte directing a hearing on possible sanctions against the City under 22 NYCRR sec. 130-1 for its allegedly improper discovery requests. There is nothing in the record to suggest that the City made its discovery requests in bad faith or for frivolous purposes, as required by the court rule.

The decision below should be reversed on all points.

Dated: October 6, 1993

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